Malayan Banking Bhd v Lim Tee Yong & Ors

HIGH COURT (ALOR SETAR) — CIVIL SUIT NO 22-09-93
MOHD HISHAMUDIN JC
1 SEPTEMBER 1994

Civil Procedure *— Summary judgment — Affidavit — Affidavit-in-reply — Service — Whether must comply with O 32 r 13(2)(b) of the Rules of the High Court 1980 — Whether 2½-month delay can be cured — Failure to object to late service — Whether amounts to waiver of rights — Rules of the High Court 1980 O 32 r 13(2)(b)*

Banking *— Banks and banking business — Overdraft facilities — Whether demand necessary to enable bank to sue — Whether notice of demand served on each defendant*

Civil Procedure *— Pleadings — Fraud — Particulars of fraud must be pleaded — Mere allegations insufficient*

The plaintiff averred that it had granted the defendants, who were partners in a partnership ('the partnership'), an overdraft facility and, in breach of a condition of the facility, the partnership had exceeded the limit of RM800,000 by RM356,598.78. Despite the plaintiff's request to regularize the account, the defendants had failed to do so and accordingly, the plaintiff served each of them with a letter of demand for the amount of RM1,156,598.78 to be paid within 14 days. The defendants failed to comply and the plaintiff brought an action against them. The defendants alleged that the plaintiff had failed to serve a notice of demand on each of them and that it had commited a fraud against them. The plaintiff applied for summary judgment under O 14 of the Rules of the High Court 1980 ('the RHC'). At the hearing of the O 14 application, two preliminary issues arose for determination, which were: (i) whether the defendants' affidavit-in-reply ('encl 28') should be disregarded as it was not served within 14 days of service of the plaintiff's affidavit as required under O 32 r 13(2)(b); and (ii) whether the plaintiff's affidavit-in-reply ('encl 23') should also be disregarded for the same reason although the defendants' counsel had not objected to it when the case first came up for hearing earlier.

Held, granting the plaintiff's application:

(1) Although the court was mindful of the fact that justice would not be served by acceding to objections on technicalities for non-compliance, it was of the view that litigants should not treat rules of procedure lightly or take the court for granted. Any litigant who neglects to adhere strictly to the rules of procedure does so at his own peril. In the present case, it would not have been a proper exercise of discretion to allow encl 28 as there had been a substantial delay of 2½ months.

(2) When the case first came up for hearing, the defendants' counsel had not objected to encl 23 but instead asked for a postponement to file an affidavit-in-reply. That amounted to a waiver of the defendants' right to object and, as such, they were estopped from raising any objection under O 32 r 13(2)(b).

(3) The words 'Repayable on demand as and when the bank deems fit' in the plaintiff's letters of offer and the decisions of the Supreme Court on this point show that a notice of demand must be served on each of the defendants as a condition to suing them. It was clear from the statement of claim and defence that the defendants were in fact served with the notice of demand and had chosen to ignore it.

(4) It is established law that the expression 'fraud' means fraud in the technical sense, ie the tort of deceit. The particulars of fraud set out in the statement of defence were vague, general, insufficient as a defence and inherently improbable.

[Bahasa Malaysia summary

Plaintif menegaskan bahawa ia telah memberi defendan, yang merupakan rakan kongsi di dalam suatu perkongsian ('perkongsian itu'), suatu kemudahan overdraf dan perkongsian itu telah memungkiri satu syarat di dalam kemudahan itu dengan melebihi had jumlah RM800,000 dengan jumlah sebanyak RM356,598.78. Meskipun plaintif telah memohon defendan supaya menyelaraskan akaun itu, defendan gagal berbuat demikian dan dengan itu, plaintif telah menyampaikan kepada setiap defendan sepucuk surat tuntutan yang menuntut supaya jumlah RM1,156,598.78 dibayar dalam masa 14 hari. Defendan gagal mematuhinya dan plaintif telah membawa suatu tindakan terhadap mereka. Defendan mengatakan bahawa plaintif telah gagal menyampaikan suatu notis tuntutan kepada setiap defendan dan bahawa ia telah melakukan fraud terhadap mereka. Plaintif telah memohon untuk penghakiman terus di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT itu'). Pada pendengaran permohonan di bawah A 14 itu, dua isu permulaan telah timbul untuk keputusan, iaitu: (i) sama ada afidavit jawapan defendan ('lampiran 28') seharusnya tidak diendahkan kerana ia tidak disampaikan dalam masa 14 hari dari tarikh penyampaian afidavit plaintif seperti yang diperlukan di bawah A 32 k 13(2)(b); dan (ii) sama ada afidavit jawapan plaintif ('lampiran 23') juga sepatutnya tidak diendahkan kerana sebab yang sama walaupun peguambela defendan tidak membuat bantahan apabila kes itu mula-mula didengar.

Diputuskan, membenarkan permohonan plaintif:

(1) Walaupun mahkamah sedar akan hakikat bahawa keadilan tidak dapat dicapai dengan membenarkan bantahan teknikal mengenai ketidakpatuhan, ia berpendapat bahawa litigan tidak seharusnya

memandang ringan kaedah prosedur ataupun bersikap tidak menghormati mahkamah. Seorang litigan yang cuai mematuhi dengan ketat kaedah prosedur, berbuat demikian pada risikonya sendiri. Di dalam kes ini, adalah tidak wajar jika mahkamah menggunakan budi bicaranya untuk membenarkan lampiran 28 kerana terdapat kelengahan besar selama 2½ bulan.

(2) Apabila kes ini mula-mula didengar, peguambela defendan tidak membuat bantahan terhadap lampiran 23 tetapi sebaliknya telah memohon penangguhan untuk memfail suatu afidavit jawapan. Itu merupakan suatu penepian hak defendan untuk membantah dan dengan demikian, mereka diestop daripada menimbulkan sebarang bantahan di bawah A 32 k 13(2)(b).

(3) Perkataan 'Kena dibayar apabila dituntut sepertimana yang dianggap sesuai oleh bank' ('Repayable on demand as and when the bank deems fit') di dalam surat tawaran plaintif dan keputusan Mahkamah Agung mengenai perkara ini menunjukkan bahawa suatu notis tuntutan mesti disampaikan pada setiap defendan sebagai suatu syarat sebelum mereka didakwa. Adalah jelas daripada pernyataan tuntutan dan pembelaan bahawa defendan pada hakikatnya telahpun disampaikan dengan notis tuntutan itu dan memilih untuk tidak mempedulikannya.

(4) Adalah undang-undang mantap bahawa ungkapan 'fraud' bermakna fraud dalam erti kata teknikal, iaitu tort perdayaan. Butir-butir fraud yang dinyatakan di dalam pernyataan pembelaan adalah tidak jelas, umum, tidak mencukupi sebagai suatu pembelaan dan memang tidak dapat dipercayai.]

[*Editorial Note*: The defendants have appealed to the Federal Court vide Civil Appeal No 02–239–94.]

Notes

For cases on pleading the particulars of fraud, see 2 *Mallal's Digest* (4th Ed) para 1733; [1992] Mallal's Digest 324.

For cases on notices of demand, see 1 *Mallal's Digest* (4th Ed) paras 870–871.

Cases referred to

Barclays Bank Ltd v Cole [1967] 2 QB 738; [1966] 3 All ER 948; [1967] 2 WLR 166 (refd)

Derry v Peek (1889) 14 App Cas 337 (refd)

Government of State of Pahang v Tengku Abdul Aziz & Anor [1978] 2 MLJ 34 (refd)

Mok Hin Wah & Ors v United Malayan Banking Corp Bhd [1987] 2 MLJ 610 (folld)

Newton Chemical Ltd v Arsenis [1989] 1 WLR 1297 (refd)

Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Bhd [1989] 3 MLJ 155 (folld)

Wallingford v Mutual Society (1880) 5 App Cas 685 (folld)

Legislation referred to

Rules of the High Court 1980 O 14, O 32 r 13(2)(b)

Lor Chin Yoon (*Hoe & Ahmad Zaki*) for the plaintiff.
Tan Lip Gay (*Leong Ng & Tan*) for the defendants.

Cur Adv Vult

Mohd Hishamudin JC: This is an application by the plaintiff for summary judgment against the second, third and fourth defendants pursuant to O 14 of the Rules of the High Court 1980 ('the RHC') (default judgment had already been obtained against the first defendant).

All the defendants are partners of a partnership known as 'Eng Hup Seng Ricemill and Trading Co'.

The plaintiff, in its statement of claim, avers that it had granted the partnership with an overdraft facility and that as of 31 October 1992, the partnership, in breach of the condition of the facility, had exceeded the limit of RM800,000 by RM356,598.78. Despite being reminded by the plaintiff to regularize the account, the defendants had failed to do so. Accordingly, the plaintiff served each of the defendants with a letter of demand demanding that the amount of RM1,156,598.78 be paid within 14 days. The defendants failed to comply. By this action, the plaintiff claims for the said amount.

In support of its application, the plaintiff filed four affidavits, that is to say:

(a) the affidavit of Abdul Hamid bin Ku Saad affirmed on 23 August 1993 (encl 14);

(b) the affidavit ('afidavit pembetulan') of Abdul Hamid bin Ku Saad affirmed on 28 October 1993 (encl 15);

(c) the affidavit ('afidavit balas') of Abdul Hamid bin Ku Saad affirmed on 2 February 1994 (encl 23); and

(d) the affidavit ('afidavit tambahan') of Abdul Hamid bin Ku Saad affirmed on 21 February 1994 (encl 27).

In opposing the application, the defendants filed their statement of defence and the following three affidavits:

(a) the affidavit of Lim Tee Keng affirmed on 5 November 1993 (encl 19);

(b) the affidavit of Lim Tee Keng ('afidavit balasan') affirmed on 6 January 1994 (encl 21); and

(c) the affidavit ('afidavit balasan tambahan') affirmed by Lim Tee Keng on 29 April 1994 (encl 28).

The affidavit in encl 19 adopts the statement of defence.

At the commencement of this hearing, two preliminary issues were raised. I shall deal with these procedural issues first. First, the learned

counsel for the plaintiff, Encik Lor Chin Yoon, objected to the defendants' affidavit in encl 28. This objection was based on O 32 r 13(2)(b) of the RHC which provides:

> Save as otherwise provided in these rules —
>
> ...
>
> (b) a party wishing to reply an affidavit served on him must first file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him.

According to Encik Lor, encl 28 was filed and served on him only on 5 May 1994, whereas the plaintiff's affidavit (encl 27) was served on the defendants' solicitor much earlier, that is, on 21 February 1994. The learned counsel for the defendants, Encik Tan Lip Gay, in reply, admitted the delay but said that he had difficulty in getting from his clients a Penang High Court Writ of Summons No 22–169–93, which is needed for the purpose of the affidavit (encl 28), and argued that the delay did not in any way prejudice the plaintiff. He urged me to exercise my discretion to allow encl 28 to be used in the proceeding. At the outset I must say that on a technical issue such as this I am always reminded by what was said by Ong Hock Sim FJ in *Government of State of Pahang v Tengku Abdul Aziz & Anor* [1978] 2 MLJ at p 34: 'We are inclined to the view that justice would not be served by acceding to objections on technicalities for non-compliance.'

At the same time, however, I am also of the view that litigants should not treat rules of procedure lightly. Nor should they take the court for granted. Any litigant who neglects to adhere strictly to the rules of procedure does so at his own peril. Although generally, the court has a discretion to allow an affidavit to be used despite there being a clear non-compliance with O 32 r 13(2)(b), nevertheless, in the present case, I upheld the objection and ruled that encl 28 be disregarded. To my mind, it would not have been a proper exercise of discretion on my part to allow the affidavit. There had been a substantial delay. Moreover, apart from what was said by Encik Tan as to the delay, there was no material before the court on which I could exercise my discretion in favour of the defendants. They had not formally applied to this court for an extension of time to file and serve the affidavit; nor, at the very least, did the affidavit in question itself (ie encl 28) account for the delay for the court to consider.

The other issue was the objection raised by Encik Tan. He objected to plaintiff's encl 23 on the ground that the service of this affidavit by the plaintiff was also not in compliance with O 32 r 13(2)(b). According to him, encl 23, which is a reply to the defendants' encl 19, was served on the defendants outside the 14-day period: it was served only on 8 February 1994. Encik Lor, however, replied that when this case first came up for hearing on 26 February 1994, Encik Tan had not objected to the affidavit but instead had asked for a postponement to enable the defendants to file an affidavit-in-reply; and as such, the defendants are now estopped from raising any objection under the rule. As Encik Lor's account of what transpired on 26 February was true, I had, accordingly, overruled the

objection on the grounds that Encik Tan, by failing to object and by seeking an adjournment with the view of filing an affidavit-in-reply, had, on that day, waived his right to object to the non-compliance with the rule by the plaintiff in respect of encl 23. A

I now move on to the substantive issues. Encik Lor, in his submission, argues on the several issues raised by the defendants in their affidavits and statement of defence. Encik Tan, on the other hand, submits only two points, namely, the alleged failure on the part of the plaintiff to serve a notice of demand on each of the defendants, and on the issue of alleged fraud. In view of Encik Tan's submission, I propose to deal only with these two issues which I shall put as follows: B C

(a) Was the plaintiff, legally, under an obligation to issue the defendants with a notice of demand; and if the answer to this question is in the affirmative, has the defence succeeded in raising a triable issue on the question as to whether or not the plaintiff had served the defendants with such a notice?

(b) Has the defence succeeded in raising a triable issue on their allegation of fraud against the plaintiff? D

As to issue (a), in view of the fact that the words 'Repayable on demand as and when the bank deems fit' are present in para 3 of each of the two letters of offer (of the overdraft facility) issued by the plaintiff to the partnership (see exh AH2 of encl 14 and exh AH7 of encl 15), and in view of the decisions of the Supreme Court in *Mok Hin Wah & Ors v United Malayan Banking Corp Bhd* [1987] 2 MLJ 610 and *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Bhd* [1989] 3 MLJ 155, I accept Encik Tan's contention that a notice of demand must be served on each of the defendants as a condition to suing them. However, as regards his contention that no notice were ever served on the defendants, with respect, upon reading the pleadings, I must disagree, and in this regard, I refer to the para 7 of the statement of claim and para 11 of the statement of defence. Paragraph 7 of the statement of claim states: E F G

> Pada 11 November 1992, plaintif melalui peguamcaranya telah mengeluar dan menyampaikan notis tuntutan dan menuntut supaya mereka membayar kesemua baki pinjaman overdraf tersebut sebanyak RM1,156,598.78 dalam masa 14 hari dari tarikh penyampaiannya tetapi defendan gagal mematuhi arahan notis tersebut. H

And para 11 of the statement of defence reads:

> Berkenaan dengan perenggan 7 pernyataan tuntutan, defendan kedua, ketiga dan keempat amatlah terkejut dan tidak payahlah mengendahinya kerana ia merupakan suatu penipuan seperti juga ditunjukkan di atas.

It will be recalled that the defendants' affidavit, encl 19, adopts the statement of defence. From the above paragraphs, it is clear that there is no dispute at all that the defendants were in fact served with the notice of demand and that they had chosen to ignore it. I

A Finally, on the question of fraud. In the statement of defence, it is alleged that the first defendant, who was the manager of the partnership, had committed fraud against the defendants, and it was committed in collusion with the manager of the plaintiff's bank and two individuals who provided the security for the overdraft. In the 'particulars' of fraud it is
B averred, inter alia, that the first defendant alone had approached the said manager and had applied for the overdraft without the knowledge of the other defendants; that the facility was granted on the security of 80 pieces of land provided by a third party; that the chargors of the land were the two individuals mentioned earlier by the name of Lim Cheng Teik and Lim Beng Kee, who were directors of a company known as Sematang Jaya
C Sdn Bhd; and that the overdraft was for purposes 'ultra vires' the partnership.

It is established law that the expression 'fraud' means fraud in the technical sense as used in *Derry v Peek* (1889) 14 App Cas 337, ie the tort of deceit: see *Barclays Bank Ltd v Cole* [1967] 2 QB 738; [1966] 3 All ER
D 948; [1967] 2 WLR 166; and *Newton Chemical Ltd v Arsenis* [1989] 1 WLR 1297. In *Barclays Bank*, the Court of Appeal held that robbery was not fraud. Lord Denning MR said ([1967] 2 QB 738 at p 744; [1966] 3 All ER 948 at p 950; [1967] 2 WLR 166 at p 169:

> ... in law 'fraud' is proved when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, careless
E whether it be true or false: see *Derry v Peek* (1889) 14 App Cas 337 at p 374; [1886–90] All ER Rep 1 at p 22, per Lord Herschell. In any case, 'fraud' involves a false representation.

It is my view that the so-called particulars of fraud as set out in the statement of defence are vague and general. For one thing, even the name
F of the bank manager (alleged to be in collusion with the first defendant) was not given. Then again, what was the alleged false representation, and by whom and to whom was the false representation made? Such vague and general averments of fraud are insufficient as a defence. Indeed, they serve no purpose at all. On this point I find support in the passages in the
G judgments of Lord Selborne LC and Lord Hatherley in *Wallingford v Mutual Society* (1880) 5 App Cas 685. Lord Selborne said (at p 697):

> With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any court ought to take notice. And here I find nothing but perfectly general
H and vague allegations of fraud. No single material fact is condescended upon, in a manner which would enable any court to understand what it was that was alleged to be fraudulent.

Lord Hatherley said at p 701:

I > There is the question of fraud upon which I said I should touch in one moment. Now I take it to be as settled as anything well can be by repeated decisions, that the mere averment of fraud, in general terms, is not sufficient for any practical purpose in the defence of a suit. Fraud may be alleged in the largest and most sweeping terms imaginable. What you have to do is, if

> it be matter of account, to point out a specific error, and bring evidence of that error, and establish it by that evidence. Nobody can be expected to meet a case, and still less to dispose of a case, summarily upon mere allegations of fraud without any definite character being given to those charges by stating the facts upon which they rest.

In any case, I am inclined to hold that the fraud story is inherently improbable. If the defendants were really serious about their allegation, why was there no police report lodged? And if indeed they are the victims of a fraudulent act committed by the first defendant in collusion with the plaintiff's manager, why did they choose not to reply and protest upon being served with the notice of demand by the plaintiff's solicitor?

In conclusion, it is my finding that there are no merits in the defence. The application for summary judgment is allowed.

Application allowed.

Reported by Anne Khoo